

FILED
2004 JAN -7 P 12:02
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RECEIPT # 52930
AMOUNT \$ 5
SUMMONS ISSUED _____
LOCAL RULE 4.1 _____
WAIVER FORM _____
MCF ISSUED _____
BY DPTY. CLK. 28
DATE 1-7-04

Abinash Pathak)
Petitioner)
V.)
Bruce Chadbourne,)
Acting Director,)
U.S. Bureau of Immigration)
and Custom Enforcement)
_____)

PETITION FOR HABEAS CORPUS

04 CV 10025 RWZ

MAGISTRATE JUDGE [Signature]

PARTIES

The Petitioner, Abinash Pathak is presently in the custody of the U.S. Bureau of Immigration and Customs Enforcement, at the Suffolk County House of Corrections (South Bay), Boston, MA.

The Respondent, Bruce Chadbourne, is the Acting Director for the U.S. Bureau of Immigration and Custom Enforcement, District of Massachusetts.

JURISDICTION

Jurisdiction is granted to the United States District Court pursuant to 28 U.S.C. sec. 2241. The Writ of habeas corpus can extend to any prisoner who is in custody "in violation of the constitution or laws or treaties of the United States." 28 U.S.C. Sec. 2241(c)(3).

SUMMARY OF THE ISSUE

Whether the Bureau of Immigration and Customs Enforcement may detain an arriving alien based in-absentia Deportation order where such order was unconstitutionally based upon an alien who was not physically present in the United States when the Notice to Appear was filed with the Immigration Court nor was the Alien physically present in the United States when the Immigration Court entered the in absentia order.

STATEMENT OF THE FACTS

The Petitioner, Abinash Pathak, is a native and citizen of India. He entered the United States in 1993, where he was admitted as a non-immigrant Visitor (B-1). Several months later, Respondent filed for political asylum before the District Director. The Petitioner returned to India because of a family emergency. The Petitioner abandoned his request for Political Asylum upon his return to India. The Petitioner returned to India sometime in 1994.

The Petitioner's Asylum Application continued to proceed through the Immigration Court system. In these proceedings, the wheels of justice turned slowly. Although the Petitioner filed his application for Political Asylum in 1993, the Immigration and Naturalization Service did not refer his case to the Immigration Judge until May 26, 1998, when it filed its Notice to Appear with the Immigration Court in Phoenix, Arizona. The Immigration Court did not know that the Petitioner departed four years earlier, entered an in absentia order on September 8, 1998.

On December 6, 2003, the Petitioner attempted to enter on a valid B-1 visa, however he was apprehended and detained as an inadmissible arriving alien as a result of the in absentia removal order.

ARGUMENT

The Petitioner Moves this Honorable Court to grant his request for Habeas Relief and STAY the Deportation of the Petitioner; order the Bureau of Immigration and Customs Enforcement to release the Petitioner immediately, order the Bureau to return the Petitioner to his non-immigrant visitor status.

The Standard for Stay's of Deportation are the same as that required for preliminary Injunctions. Ralph v. Lucent Technologies, 135 F.3d. 166, 167-68 (1st. Cir. 1999). Here the Petitioner has significant risks of irreparable harm if the injunction is withheld because he will lose the Jurisdiction of this Court relative to his Petition for Habeas Corpus provided by 28 U.S.C. 2241. Petitioner has a substantial likelihood of success on the Merits; there exists a favorable balance of the hardship to the petitioner without any undue burdening delay to the Bureau of Immigration and Customs Enforcement and there exists a public benefit to adjudicate the issues which the Petitioner raises in this District.

For the reasons set forth above, this Court should allow the stay request, and all other relief that is appropriate with this action.

Respectfully Submitted,

The Petitioner,
By His Attorney,



STEPHEN A. LAGANA, ESQ.

Lagana & Associates

145 Essex Street

Lawrence, MA. 01841

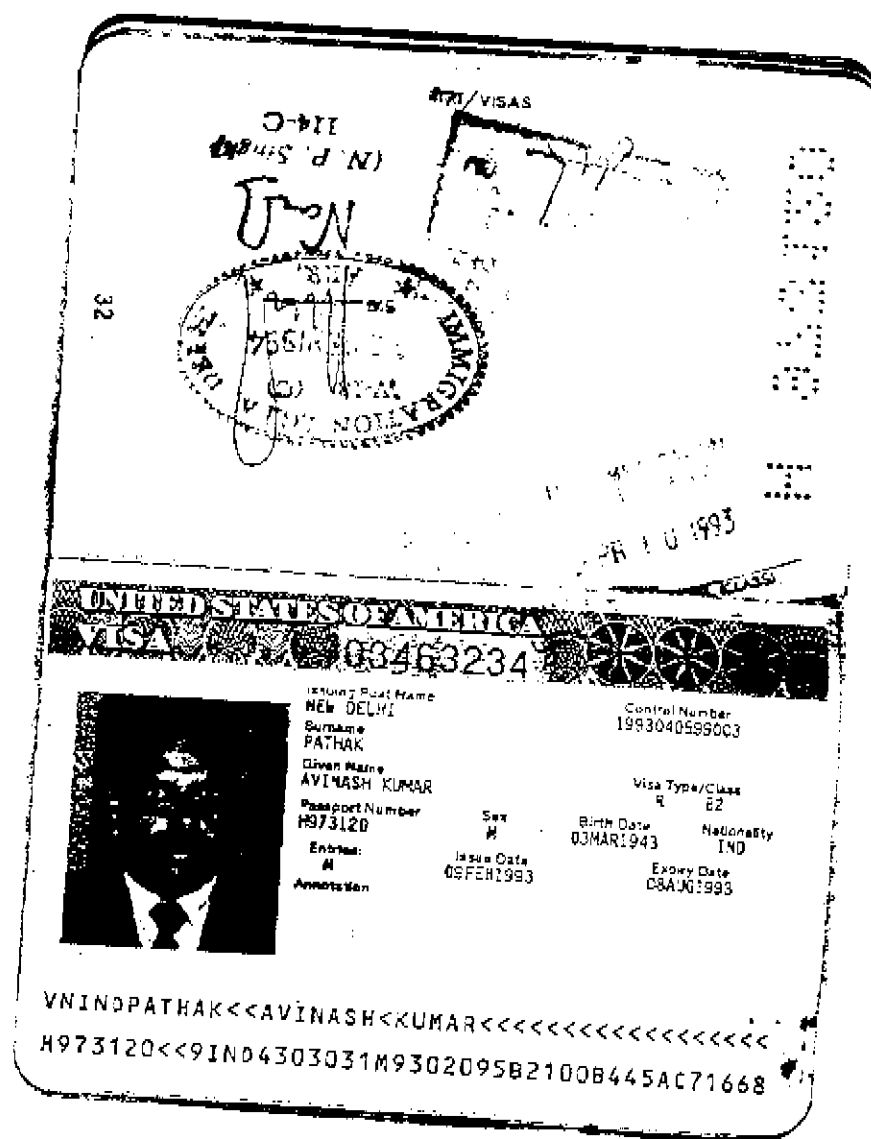
978-794-2331

617-283-1018 (cell)

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|--|--|
| Departure Number | |
| 506549946 03 | |
| Immigration and Naturalization Service | |
| I-94 Departure Record | |
| OCT 09 1993 | |
| 14. Family Name | |
| P A T H A K | |
| 15. First (Given) Name | |
| A V I N A S H | |
| 16. Birth Date (Day/Mo/Yr) | |
| 03/10/1943 | |
| 17. Country of Citizenship | |
| I N D I A | |

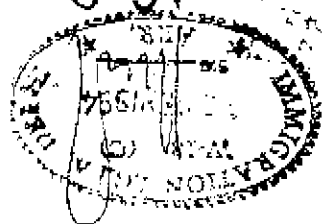
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~~SECRET~~/VISAS

W-1
(N. P. Smith)
114-C



2A 10 1993

UNITED STATES OF AMERICA

03463234



Existing Post Name
 NEW DELHI
 Surname
 PATHAK
 Given Name
 AVINASH KUMAR
 Passport Number
 H973120
 Entered:
 M
 Annotations

Control Number
1993040595003

Visa Type/Class
E E2

Birth Date 03MAR1943
Nationality IND

Issue Date
09FEB1993

Expiry Date
08 AUG 1993

VNINDPATHAK<<AVINASH<KUMAR<<<<<<<<<<<<<<<<<<<
H973120<<9IND4303031M930209SB2100B445AC71668

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